

1402478 (Migration) [2015] AATA 3290 (31 July 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Clive Andrew John Horne

VISA APPLICANT: Ms Ailene Amatos

CASE NUMBER: 1402478

DIBP REFERENCE(S): OSF2013/040721

MEMBER: Wendy Banfield

DATE: 31 July 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations
- Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 of the Regulations

Statement made on 31 July 2015 at 12:17pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 January 2014 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 26 March 2013 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.225 because it was determined that a bogus document had been provided with the application in breach of Public Interest Criteria (PIC) 4020.
4. The following evidence was provided in support of the relationship:
 - Optus statements covering 2011 to 2013 showing regular calls from the sponsor to the visa applicant;
 - Evidence of several trips to Australia by the visa applicant and to the Philippines by the sponsor;
 - Supporting witness statements;
 - Extensive chat records between the visa applicant and sponsor;
 - Evidence of the parties' attendance at a Pre-Cana seminar on 17 March 2013 at a Catholic church in the Philippines;
 - Wedding invitation and cards;
 - Photos of the wedding including guests;
 - Photos of the visa applicant and sponsor together with her daughter;
 - A Sunsuper statement dated 31 October 2011 that indicates the visa applicant is a beneficiary;
 - Legal documentation from the Family Court in Samar, Philippines regarding the adoption of the visa applicant's daughter;
 - Western Union money transfers demonstrating the regular transfer of funds from the sponsor to the visa applicant;
 - Court order directing the authorities in the Philippines to remove the sponsor's name from the visa applicant's daughter's birth certificate and to remove his surname from her name;
 - Written statements by the visa applicant and sponsor.

5. The review applicant appeared before the Tribunal on 5 June 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Ms Amatos who is the review applicant's spouse.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant and the sponsor are in a genuine and continuing spouse relationship and if there are compelling and compassionate circumstances for the waiver of PIC 4020.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. *Financial aspects of the relationship*
12. The sponsor provided documents in support of the financial aspects of the relationship which included his Sunsuper statement that demonstrates the visa applicant has been a beneficiary since 2011. Western Union money transfers to the visa applicant in the Philippines were also submitted in evidence. The sponsor gave evidence at the hearing that he has supported the visa applicant, her daughter and his mother-in-law for some time and has paid for the visa applicant to continue schooling. He claims he bought a house for them so they would have a better place to live; however, there is no independent evidence of this. The sponsor has financed the visa applicant's trips to visit him in Australia and has travelled to visit her as well. The Tribunal is satisfied that the parties have demonstrated the pooling of financial resources, and the sponsor's support for the visa applicant's day-to-day expenses.
- 13.

14. *Nature of the household*

15. While the parties continue to live in separate countries, there is evidence of joint responsibility for the care and support of the visa applicant's child. The sponsor is undertaking legal proceedings in order to adopt her, and has obtained an Order from a court to correct her birth certificate that erroneously lists him as the natural father. There are photos that depict the visa applicant and sponsor together with the visa applicant's daughter which supports claims that they have a close relationship.
16. The visa applicant has visited Australia three times on three month visitor visas and according to the evidence of the parties; she has lived with the sponsor during those visits.

17. *Social aspects of the relationship*

18. Witness statements and photos demonstrate that the parties represent themselves to other people as being married to each other. They have undertaken joint social activities with the sponsor's family members in Australia and the visa applicant's family in the Philippines.
19. The sponsor's former sister-in-law with whom he maintains a close relationship gave evidence at the hearing in support of the application. Ms Therese Allen said she had known the sponsor for thirty years. She said the visa applicant had changed his way of thinking since meeting the visa applicant and he desperately wants to have a family.

20. *Nature of persons commitment to each other*

21. The sponsor provided evidence of ongoing communication including regular telephone calls and online messaging. The parties gave consistent evidence at the hearing about how they first met and began a relationship. They were married on 20 March 2013 in a Catholic church in the Philippines and have maintained a committed relationship since they met in 2011. At the time of meeting, the visa applicant had a child aged 10 months who was the result of a short relationship. The sponsor has accepted her daughter as his own and is taking steps to adopt her. The Tribunal accepts that based on the evidence, the visa applicant and sponsor have lived together whenever possible and they provide each other with companionship and emotional support. The Tribunal also accepts that they see the relationship as long-term.

22. **Public Interest Criteria 4020**

23. The delegate found that the visa applicant failed to satisfy cl.320.225 and therefore the partner visa was refused. The visa applicant had not listed any children from a previous relationship on her application form for a partner visa when in fact; she has a daughter, Keisha Amatos, born in 2010. The Department found that the parents of Keisha were listed as the visa applicant and the sponsor.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

24. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.

25. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
26. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
27. The false information provided in this case was the visa applicant's failure to list her child from a previous relationship on her application for a partner visa and the sponsor having allowed his name to put on Keisha Amatos' birth certificate when he is not her biological father.
28. The visa applicant and the sponsor's sister-in-law gave strong evidence that the sponsor has done everything he can to assume a parental role in Keisha's life, which included the mistakes that led to the visa refusal. The parties explained that Keisha was born after a brief liaison with an American man and in order to help her mother, the sponsor agreed to have himself listed as her father on the birth certificate when the child was to be baptised. He was advised later that this was a serious error and he would have to have his name removed from the birth certificate and adopt Keisha instead. He was also told that Keisha would not be able to leave the country until the matter had been corrected.
29. When the visa applicant and sponsor filled in the visa application forms, they did not know what to do about Keisha as the matter of the birth certificate and adoption were at issue. The sponsor said he was concerned it would appear he was trying to take Keisha out of the country unlawfully if she was included on the application form so he had instructed the visa applicant not to list her at that time. On his evidence, he thought the question the visa applicant had to answer was in relation to Keisha being included as an applicant, not that she was a child of a previous relationship.
30. In her evidence to the Tribunal, the sponsor's sister-in-law conceded that the sponsor had brought the issue upon himself but said it was inadvertent and due to his nativity. According to Ms Allen, the sponsor often had difficulty with understanding forms and was intimidated by the bureaucratic process. She said because of the sponsor's age and financial sacrifices, it would be tragic for all concerned if the parties had to wait a further three years to re-apply for a partner visa.

31. Should the requirements of cl.4020 be waived?

32. Relevant to this case, the Minister may waive the requirements of PIC 4020 if satisfied that there are compassionate or compelling circumstances that affect the interests of an Australian citizen that justifies the granting of the visa.
33. On balance, the Tribunal accepts that there are compassionate reasons for waiving PIC 4020 in this case. Having had the benefit of seeing and hearing the sponsor at the hearing, and taking evidence from him, the visa applicant and the witness, Ms Allen, the Tribunal is satisfied that the sponsor did not deliberately attempt to mislead or provide false information during the application process. He admitted what had happened and why and took full responsibility for it. He conceded that he was frustrated by the visa application process in Manila as he was due to leave the country and was impatient with the visa applicant when she asked him for help filling in her form. The parties have since obtained an order from a

court in the Philippines to correct Keisha's birth certificate and the sponsor has made arrangements to travel to Manila on 6 August 2015 for the adoption hearing.

34. The compassionate reasons relate to the sponsor who is an Australian citizen. He has been supporting the visa applicant and her daughter financially for several years despite earning a very average wage as a warehouse manager. He has assisted with their education, living arrangements, travel and daily needs. On the evidence presented at the hearing, the sponsor has gone without necessities for himself in order to provide for the family in the Philippines. The sponsor has had few serious relationships in the past and has no children of his own. He has expressed a desire to continue his full parental support for Keisha as well as having children with the visa applicant in future.
35. For these reasons, the Tribunal finds that the requirements of cl.4020 should be waived.
36. The Tribunal is satisfied that the visa applicant and sponsor have a mutual commitment to shared life to the exclusion of all others; they have a genuine and continuing relationship; and they do not live separately and apart on a permanent basis.
37. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
38. Therefore the visa applicant meets cl.309.211 and cl.309.221.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 of the Regulations

Wendy Banfield
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).